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Supreme Court of the United States

No. 525, October Term, 1940

READING COMPANY, Petitioner

v.

THOMAS E. LARKIN, Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OFFICIAL REPORTS OF OPINIONS OF LOWER COURT

The opinion of the United States District Court for the Middle District of Pennsylvania, in this case is reported in 28 Federal Supplement 292.

The opinion of the United States Court of Appeals for the Third Circuit is reported in 114 Federal Reporter (2d series) 416.

QUESTION PRESENTED

Whether respondent was entitled to recover damages under the Federal Employers' Liability Act of April 22, 1908, c149, 45 USCA Sec. 51.

STATEMENT OF THE CASE

The plaintiff employed by defendant as a brakeman, was knocked off the end ladder of one of two standing cars by the negligent operation of the shifting engine, thrown to the ground between these cars where the wheels of the other car completely severed his right arm. This occurred while the plaintiff was engaged in the movement of cars in interstate transportation.

ARGUMENT

The respondent at the trial undertook to prove that he was engaged in interstate transportation when injured by showing:

(a) That the car—Reading No. 24626—which cut off his arm contained a shipment of coal from another state which had not reached its destination.

(b) That the empty car—Reading No. 73165—was being shifted into a position to receive from a crippled car coal which had come from and was consigned to a point outside the State.

Reading Car No. 24626 was the one which cut off respondent's arm (Rec. 47). It contained coal which had come from West Virginia in B. & O. Car No. 327256 originally consigned to New Jersey (Rec. 45). The B. & O. car had been derailed near Harrisburg and the coal transferred to the Reading car. It was argued for the petitioner that this was salvaged coal purchased by the petitioner and reconsigned to Gettysburg, Pa., a point within the State. On behalf of the respondent, however, it was urged that this coal had not reached its destination and was, therefore, still in interstate transportation. The District Court submitted this question to the jury. The Circuit Court held that the undisputed documentary proofs from the files and records of the petitioner established the ownership of this coal as still the property of the original consignor, and that the trial court could properly have ruled as a matter of law that respondent was engaged in interstate commerce when injured.

The empty car—Reading No. 73165—together with the ash car—Reading No. 83522—had been shifted by respondent's crew from the power house siding. They were backed westwardly on the thoroughfare track, the empty car being kept on the rear or westward end of the draft. As they approached the switch leading into Track No. 17, these cars were detached and "kicked" further westward along the thoroughfare track clear of the switch so that the engine could proceed unto Track No. 17 and pick up the two cars standing there. This empty car—Reading No. 73165—was thus kept at the rear of the draft. Within twenty or thirty minutes after the respondent was injured, it was placed by another crew under the tipple at the loading dock (Rec. 86, 87, 88). There, on the same day, a cargo of coal coming from West Virginia in Central Railway of New Jersey Car No. 61372 was loaded into it (Rec. 55). According to the wheel reports (Exhibit 12), Reading Car No. 73165 then left the Rutherford Yard January 10, 1937, the day after the accident. From the way bill (Exhibit 11) it was shown that the cargo was received at Jersey City, New Jersey, two days later (Rec. 56). This testimony clearly shows that the shifting of this empty car by respondent's crew was a forward movement in interstate commerce. The District Court submitted these facts to the jury under proper instructions, and the Circuit Court held that this testimony was evidence of interstate transportation.

The petitioner also assigns as error the Trial Judge's ruling on the admissibility of evidence. It was testified to by respondent that his crew conductor instructed him to get the empty coal car (Reading No. 73165) from the power house siding and place it "under the coal trestle to be loaded with coal from a crippled car there" (Rec. 19, 20, 23). The Circuit Court affirming the opinion of the District Court, has held that this testimony was relevant and admissible. It was not beyond the scope of the conductor's authority

and was not a characterization of the car movement as being in interstate commerce.

The Circuit Court of Appeals has carefully and comprehensively reviewed this case. Its opinion is a complete answer to the petition for Writ of Certiorari. This case presents for decision no questions concerning the interpretation of the Federal Employers Liability Act. The only matter presented by the petition involves consideration of facts and of general law.

Texas & Pacific Rwy. Co. v. Prater, 229 U. S. 177.

Southern Rwy. Co. v. Gadd, 233 U. S. 572.

In the light of the opinions just cited, it is suggested that the purpose of this petition is merely to delay proceedings on the judgment of the lower court. Under these circumstances, Rule 30, Paragraph 2 of the Rules of the Supreme Court should be applied. This rule reads as follows:

> "2. In all cases where an appeal delays proceedings on the judgment of the lower court and appears to have been sued out merely for delay, damages at a rate not exceeding ten per cent in addition to interest may be awarded upon the amount of the judgment."

It is respectfully submitted that the petition for a Writ of Certiorari in this case should be denied.

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